(3)

FILED

NOV 2 - 1998

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-527
In The
SUPREME COURT OF THE UNITED STATES
October Term 1998

DANIEL CASEY, SGT., DECEASED, ETC., ET AL.,
Petitioners,

v.

DONOVAN BLISSETT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF OHIO, ALABAMA, ARIZONA, DELAWARE, FLORIDA, GEORGIA, IDAHO, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, OKLAHOMA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, THE COMMONWEALTHS OF MASSACHUSETTS AND PENNSYLVANIA AND THE TERRITORIES OF GUAM AND THE U.S. VIRGIN ISLANDS IN SUPPORT OF THE PETITIONERS

BETTY D. MONTGOMERY
Attorney General of Ohio
JEFFREY S. SUTTON
State Solicitor
Counsel of Record
TODD R. MARTI
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980
Counsel for *Amici* States

16 pp

BILL PRYOR
Attorney General
State of Alabama

GRANT WOODS
Attorney General
State of Arizona

M. JANE BRADY
Attorney General
State of Delaware

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

THURBERT E. BAKER
Attorney General
State of Georgia

ROBERT H. KONO
Attorney General (Acting)
Territory of Guam

ALAN G. LANCE
Attorney General
State of Idaho

JAMES E. RYAN
Attorney General
State of Illinois

JEFFREY S. MODISETT
Attorney General
State of Indiana

CARLA J. STOVALL
Attorney General
State of Kansas

RICHARD P. IEYOUB
Attorney General
State of Louisiana

SCOTT HARSHBARGER
Attorney General
Commonwealth of Massachusetts

FRANK J. KELLEY
Attorney General
State of Michigan

HUBERT H. HUMPRHEY
Attorney General
State of Minnesota

MIKE MOORE
Attorney General
State of Mississippi

JOSEPH P. MAZUREK
Attorney General
State of Montana

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

PHILIP T. McLAUGHLIN
Attorney General
State of New Hampshire

PETER VERNIERO
Attorney General
State of New Jersey

MICHAEL F. EASLEY
Attorney General
State of North Carolina

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

MICHAEL FISHER
Attorney General
Commonwealth of Pennsylvania

MARK BARNETT
Attorney General
State of South Dakota

JOHN KNOX WALKUP
Attorney General
State of Tennessee

JULIO A. BRADY
Attorney General
Territory of the U.S. Virgin Islands

JAN GRAHAM
Attorney General
State of Utah

WILLIAM H. SORRELL
Attorney General
State of Vermont

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED ii

TABLE OF AUTHORITIES iii

STATEMENT OF *AMICI* INTEREST 1

REASONS FOR GRANTING THE WRIT 3

I. THE CIRCUITS ARE IN CLEAR, ACKNOWLEDGED, AND DEEPENING CONFLICT 3

II. THIS CASE RAISES QUESTIONS OF GREAT IMPORTANCE TO THE STATES AND THE COURTS 5

III. THE SECOND CIRCUIT ERRED 6

CONCLUSION 8

QUESTION PRESENTED

Whether the limitations on attorney fees established by the Prison Litigation Reform Act apply where both the underlying trial and the ensuing fee proceeding took place after the Act was adopted.

TABLE OF AUTHORITIES

Page

CASES

Alexander S. v. Boyd,
113 F.3d 1373 (4th Cir. 1997),
cert. denied, 118 S.Ct. 880 (1998) 3,4
Barnes v. Ramos,
1998 WL 12035 (N.D. Ill. Mar. 13, 1998) 3
Blissett v. Casey,
147 F.3d 218 (2d Cir. 1998) 4
Campbell v. McGruder,
Case No. 1462-71 (D.D.C. 1971) 1
Collins v. Algarin,
1998 WL 10234 (E.D. Pa., Jan. 9, 1998) 4,5
Cooper v. Casey,
97 F.3d 914 (7th Cir. 1996) 4
Glover v. Johnson,
138 F.3d 229 (6th Cir. 1998),
petition for cert. pending, (No. 98-262) 3,4,5
Gwaltney v. Chesapeake Bay Foundation,
484 U.S. 49 (1987) 7
Hadix v. Johnson,
143 F.3d 246 (6th Cir. 1998),
petition for cert. pending, (No. 98-262) 3,4,5
Hines v. Anderson,
439 F.Supp. 12 (D.Minn. 1977) 1
Jensen v. Clarke,
94 F.3d 1191 (8th Cir. 1996) 4
Kansas v. Hendricks,
117 S.Ct. 2072 (1997) 6
Landgraf v. U.S.I. Film Products,
511 U.S. 244 (1994) ..... *passim*

Lindh v. Murphy,
117 S.Ct. 2059 (1997) 3,4,5,6
Madrid v. Gomez,
150 F.3d 1030 (9th Cir. 1998) 3,4,5,7
United States v. Wilson,
503 U.S. 329 (1992) 7
Williams v. Brimeyer,
122 F.3d 1093 (8th Cir. 1997) 4

STATUTES AND LEGISLATIVE HISTORY

42 U.S.C. § 1997e(d) 2
141 Cong. Rec. H1042
(daily ed. Feb. 1, 1995)
(statement of Rep. Hoke) 2
141 Cong. Rec. H1480
(daily ed. Feb. 9, 1995)
(Statement of Rep. Canady) 2
141 Cong. Rec. S14317
(daily ed. Sept. 29, 1995)
(statement of Sen. Abraham) 2
Prison Litigation Reform Act,
Pub. L. 104-134, 110 Stat. 321 2,6

OTHER AUTHORITIES

Criminal Justice Institute, Inc.,
The Corrections Yearbook (1997) 1,2
J. Marquat and B. Crouch,
Judicial Reform and Prisoner Control: The Impact of Ruiz v. Estelle on a Texas Penitentiary, 55 Law & Society Review
557 (1985) 1

STATEMENT OF *AMICI* INTEREST

The State of Ohio, together with 27 other *amici* States and Territories, support the efforts of the State of New York to seek review of the lower-court decision.

Operating prisons is one of the most vexing, and central, of State functions. The States' ability to perform that function became, and continues to be, hindered by a great number of institutional reform lawsuits that have resulted in hundreds of prisons and jails being placed under judicial supervision through consent decrees and similar arrangements. Although some of those cases initially served a wholesome function, they grew in number and scope, resulting in excessive judicial involvement in the day-to-day operations of such facilities. Recent studies indicate that more than 300 adult prisons are controlled by such arrangements. Criminal Justice Institute, Inc., *The Corrections Yearbook*, 54-55 (1997).

This development has had a number of deleterious consequences -- among other things, depriving administrators of the flexibility needed to perform their inherently difficult duties, undermining the effectiveness of line correctional staff, and adding great expense to an already costly aspect of State government. J. Marquat and B. Crouch, *Judicial Reform and Prisoner Control: The Impact of Ruiz v. Estelle on a Texas Penitentiary*, 55 Law & Society Review 557 (1985). Most vexingly, judicial management of state prisons often continues for years, as evidenced by the fact that some States are burdened by decrees entered more than a generation ago. *See Campbell v. McGruder*, Case No. 1462-71 (D.D.C. 1971) (decree pending for twenty-seven years); *Hines v. Anderson*, 439 F.Supp. 12 (D.Minn. 1977) (decree pending for twenty-one years).

Congress tried to address many of these problems through the Prison Litigation Reform Act, Pub. L. 104-134, 110 Stat. 321 ("PLRA"), which includes several measures designed to help States regain control of their prisons. One such measure is a provision that limits the attorney fees available in these cases. 42 U.S.C. § 1997e(d).

Prior to the PLRA, overly generous fee awards, particularly in the post-decree implementation phase, caused cases to become unduly wide in scope and long in duration. The PLRA limitations attempt to remove financial incentives to broaden and prolong such cases unnecessarily. 141 Cong. Rec. H1042 (daily ed. Feb. 1, 1995) (statement of Rep. Hoke); 141 Cong. Rec. H1480 (daily ed. Feb. 9, 1995)(Statement of Rep. Canady); 141 Cong. Rec. S14317 (daily ed. Sept. 29, 1995) (statement of Sen. Abraham).

In at least one respect, several lower courts have failed to give full effect to Congress's policy goals. The circuits are sharply divided over whether § 1997e(d) should apply to a large number of pre-enactment cases that continue to linger in the federal courts. This development has not only caused confusion in the thousands of individual cases described in New York's Petition, but will also dilute Congress's efforts to curb the 333 already-pending institutional reform cases. *The Corrections Yearbook*, 54. Only a decision by the Court can resolve these uncertainties and in the end ensure that the Congressional goals of the PLRA are uniformly fulfilled.

REASONS FOR GRANTING THE WRIT

This case merits review for three independent reasons: to resolve an acknowledged and deepening split between the circuits; to address the important federal questions raised in the case; and to correct a lower-court error.

I. THE CIRCUITS ARE IN CLEAR, ACKNOWLEDGED, AND DEEPENING CONFLICT.

Lindh v. Murphy, 117 S.Ct. 2059 (1997), and *Landgraf v. U.S.I. Film Products*, 511 U.S. 244 (1994), establish a three-step process for analyzing the applicability of a statute to a case pending on the date of its enactment. Clear inter-circuit conflicts have developed as to how § 1997e(d) fares under each of those steps, leaving lower courts and litigants in "gray zones of retroactivity analysis" because "courts have not reached any coherent consensus as to which cases § 1997e(d) should be applied." *Barnes v. Ramos*, 1998 WL 12035, Slip. Op. at * 1 (N.D. Ill. Mar. 13, 1998).

The circuits have reached conflicting results on the first step of the *Lindh/Landgraf* analysis -- whether the text of § 1997e(d) even has the potential to apply to cases pending on the date of enactment. The Ninth Circuit has expressly held that not only is it textually possible to apply § 1997e(d) to pre-enactment cases, but the text also requires such a result. *Madrid v. Gomez*, 150 F.3d 1030, 1035 (9th Cir. 1998). The Fourth Circuit has implicitly reached the same conclusion. *Alexander S. v. Boyd*, 113 F.3d 1373, 1385-1386 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 880 (1998). The Sixth Circuit has reached an opposite conclusion. *Hadix v. Johnson*, 143 F.3d 246, 255 (6th Cir. 1998), *petition for cert. pending*, (No. 98-262). *Glover v. Johnson*, 138 F.3d 229, 249 (6th Cir. 1998), *petition for cert. pending*, (No. 98-262). Both sets of circuits have openly acknowledged the split. *Madrid*, 150 F.3d at 1035;

Hadix, 143 F.3d at 251-252; *Glover*, 138 F.3d at 249-250. *See also Blissett v. Casey*, 147 F.3d 218, 220 (2d Cir. 1998) (reproduced at Pet. A-5, A-6).

A conflict also exists regarding the second step of the *Lindh/Landgraf* analysis. This phase examines the statute to determine whether the legislature meant to apply the statute to pending cases. The Fourth and Ninth Circuits have held that § 1997e(d)'s direction that "no award" be made in "any" prisoner case shows that Congress meant the legislation to apply to pending cases. *Alexander S.*, 113 F.3d at 1385-1386; *Madrid*, 150 F.3d at 1035-1037. In contrast, courts in the Second, Third, Sixth, Seventh, and Eighth Circuits have held that no such direction exists. *Blissett*, 147 F.3d at 221 (reproduced at Pet. A-7); *Collins v. Algarin*, 1998 WL 10234 (E.D. Pa., Jan. 9, 1998) Slip. Op. at * 3; *Glover*, 138 F.3d at 249; *Hadix*, 143 F.3d at 251-252; *Cooper v. Casey*, 97 F.3d 914, 921 (7th Cir. 1996); *Jensen v. Clarke*, 94 F.3d 1191, 1202 (8th Cir. 1996). Once again, several courts have openly acknowledged the conflict. *Glover*, 138 F.3d at 249-250; *Hadix*, 143 F.3d at 251-252; *Madrid*, 150 F.3d at 1035.

The deepest and ripest inter-circuit conflict, however, exists on the third prong of the *Lindh/Landgraf* analysis, that is, whether the statute would have an improper retroactive effect. Courts in the Third, Fourth, and Ninth Circuits have found no such effect. *Collins*, 1998 W.L. 10234, Slip. Op. at ** 5,6; *Alexander S.*, 113 F.3d at 1387-1388; *Madrid*, 150 F.3d at 1038-1040. And the Sixth and Seventh Circuits have found such an effect. *Glover*, 138 F.3d at 250; *Cooper*, 97 F.3d at 921. Courts in the Second and Eighth Circuits have indicated that the question could be resolved in differing ways in cases with differing facts. Compare *Jensen*, 94 F.3d at 1202-1203 (retroactive as to fees for pre-enactment work) with *Williams v. Brimeyer*, 122 F.3d 1093 (8th Cir. 1997) (not retroactive as to fees for post-enactment work); *Blissett*, 147 F.3d at 221 (reproduced at Pet. A-7) (noting the potential for differing

results based on when the work giving rise to fees was done). *See also, Hadix*, 143 F.3d at 252 (rejecting the relevance of the date legal work was done) and *Madrid*, 150 F.3d at 1036 n. 9 (same). As is true of the other *Lindh/Landgraf* steps, the conflict here is openly acknowledged. *Glover*, 138 F.2d at 250 (noting inter-circuit conflict); *Collins*, 1998 WL 10234 at * 5; *Barnes*, 1998 W.L. 12035 at * 2.

In the end, the only material agreement among the lower courts is that they disagree over the applicability of the fee restrictions to pending cases. The *amici* States respectfully submit that this deep and growing conflict supplies an independent and adequate ground for granting the writ.

II. THIS CASE RAISES QUESTIONS OF GREAT IMPORTANCE TO THE STATES AND THE COURTS.

Even aside from the clear conflict presented, the case also presents important federal questions. The absence of clear direction from this Court will perpetuate uncertainty in States containing some of the nation's largest prison systems. The case also provides an opportunity to address an aspect of the *Lindh/Landgraf* analysis that has never been fully explained.

The mixed resolutions of the question presented creates great uncertainty for States, plaintiffs' counsel, and the courts in circuits containing some of the nation's largest prison systems. For example, the Second Circuit decision at issue here did not squarely delineate how to apply § 1997e(d); it merely ruled out one of several alternatives. Similarly, the issue has not been resolved in the First, Third, Fifth, Tenth, Eleventh and District of Columbia Circuits. Those circuits contain the States of New York, Pennsylvania, Texas, and Florida, among others, which operate some of the largest correctional systems in the

country. Courts and litigants in those States, and the 21 other States and territories in those circuits, have no clear answer to the issue at hand. This Court should provide that answer.

The case also merits this Court's attention because it provides an opportunity to answer an important but open question: What is needed to "expressly prescribe [a] statute's proper reach" under the second prong of the *Lindh/Landgraf* analysis? As noted in *Lindh*, that question was not reached in *Landgraf*, and it was also left unanswered in *Lindh*. *Lindh*, 117 S.Ct. at 2063. An answer to the question now will help avoid additional litigation over the issue -- litigation, incidentally, that needlessly exacerbates the very problems the PLRA was designed to curb.

III. THE SECOND CIRCUIT ERRED.

Review, lastly, is warranted because the decision below fails properly to apply two parts of the *Lindh/Landgraf* analysis. The most important part of the *Lindh/Landgraf* analysis is "to determine whether Congress has expressly prescribed the statute's proper reach," an approach consistent with this Court's precedents in related areas. *See Kansas v. Hendricks* 117 S.Ct. 2072, 2082 (1997) (noting the importance of textual analysis in the ex post facto context). A review of the Second Circuit's decision reveals that although it is long on decrying the potential unfairness of applying § 1997e(d) to pending cases, it is critically short in determining what Congress said on the topic. Indeed, it did not even devote a full paragraph to the matter.

Had the court engaged in the type of analysis required by *Lindh* and *Landgraf*, it would have found that Congress was quite explicit as to which cases it sought to control by § 1997e(d). The statute provides that "no" award shall be made in "any" case "brought" without complying with its terms. The use of such all-inclusive, unqualified terms as "no" and "any" indicates that Congress intended an all-inclusive and unqualified

application of the statute. *Lindh*, 117 S.Ct. at 2064, n.4. And use of the backward-looking verb "brought" indicates that Congress was not excluding cases commenced before it enacted § 1997e(d). *See United States v. Wilson*, 503 U.S. 329, 333 (1992); *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 57 (1987). However, the court below inexplicably ignored these linguistic cues.

The court also erred in its analysis under the second prong of *Landgraf*. Its decision is primarily, if not exclusively, based on the fact that some of the conduct drawn on by § 1997e(d) antedated the statute's enactment and that § 1997e(d) would likely upset counsel's expectations. However, *Landgraf* expressly held that such effects are not sufficient to preclude application of a statute. *Landgraf*, 511 U.S. at 269-270, n. 24. As recently recognized by the Ninth Circuit, counsel seeking fees under 42 U.S.C. § 1988 have no reasonable "settled" expectation of any specific fee award until they have both prevailed on the merits and satisfied the court that the fees they seek are reasonable, all of which happened in this case *after* enactment. *See Madrid*, 150 F.2d at 1038-1039. Hence, even if counsel's expectations were relevant, they were not retroactively dashed for purposes of *Landgraf* and the court below erred in giving them such significant weight. The lower court improperly ignored Congress's clearly expressed intentions and this Court's unequivocal teachings in *Landgraf*. Both errors support review.

CONCLUSION

For the foregoing reasons, the *amici* States respectfully urge the Court to grant the writ.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio
JEFFREY S. SUTTON
State Solicitor
Counsel of Record
TODD R. MARTI
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980

Counsel for *Amici* States

October 29, 1998